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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No. PD-0228-17

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/30/2018
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS, Appellant

v.

JOSE LUIS CORTEZ, Appellee

Appeal from Potter County

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STATE PROSECUTING ATTORNEY'S

MOTION FOR REHEARING

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The trial court ruled that the officer in this case lacked reasonable suspicion to detain appellee for driving on an improved shoulder in violation of TEX. TRANSP. CODE § 545.058(a). The court of appeals affirmed. This Court granted review of the State's question presented, which was, "Does the improved shoulder of a highway begin at the inside edge of the 'fog line,' the outside edge, or somewhere in between?" The question was framed thus because both the trial court and the court of appeals held that driving on the fog line is not a violation. This Court did not answer the question presented. It instead offered three alternative arguments for affirming the court of appeals; one that is not supported by the record, one that is not supported by the law (or at least not explained using it), and one that was neither raised nor addressed by the parties in this Court.

POINT ON REHEARING

The Court should either fully address the issues presented or raised *sua sponte* in order to provide something of more jurisprudential value, limit its opinion to its "factual" holding, or withdraw its opinion and dismiss the State's petition as improvidently granted.

ARGUMENT AND AUTHORITIES

I. The Court has created a factual issue that is not there.

The Court appears to conclude that appellee did not even drive on the fog line.[1] As argued in the State's brief, 1) this would not be fatal so long as it reasonably appeared to the officer that appellee did, and 2) the trial court's findings either assume that appellee drove on the fog line or the reasonableness of the appearance of such.[2] The Court addresses neither point, instead resolving the fact issue against the State based on excerpts from the trooper's testimony.[3]

This sort of judicial factfinding is prohibited, even in support of the trial court's ruling.[4] It is worse when the "supplemented" findings contradict the official findings. The trial court did not find the trooper's statement that he saw appellee drive on the fog line to be incredible, and it conceded that the video possibly showed that.[5] Its

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[1] Slip op. at 11-12.

[2] State's Br. at 2-3, 3 n.4.

[3] Slip op. at 11-12.

[4] *State v. Saenz*, 411 S.W.3d 488, 495 (Tex. Crim. App. 2013) ("We will not presume factual findings that may be dispositive in a case when a trial court's findings are an inadequate basis upon which to make a legal conclusion and when those findings have been properly requested by a losing party.").

[5] Findings of Fact 10 & 11.

analysis flows its occurrence.[6] This Court had no right to substitute its judgment for that of the trial court.[7] However, if the Court believes this case can be decided on a purely factual basis, it should have done so without issuing the *dicta* that is the remainder of its opinion.

II. Non-construction construction

The Court is willing to assume that appellee's vehicle "did touch the fog line" but finds it unnecessary to "establish a definitive rule regarding whether every fog line painted on a roadway is part of the roadway or part of the shoulder."[8] It explicitly rejects, however, the State's view by "declin[ing] to give such a broad interpretation to section 545.058(a)."[9] It also concludes that a "momentary touch of the fog line, without any other indicator of criminal activity," is not a violation of the statute.[10] And it confirms its conclusions with reference to a number of lower court opinions that construe the statute by considering the duration and degree of

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[6] Conclusions of Law 21 ("The improved shoulder of a state roadway begins at the point of the fog line which is furthest from the center of the roadway."), 22 ("Crossing over the portion of the fog line nearest the center of the roadway or upon the fog line is not a violation of Texas traffic law; therefore the vehicle was not operated on the improved shoulder of the roadway on either occasion made the basis for the Officer Snelgrooes' traffic stop.").

[7] In any event, the Court details its skepticism as to the first alleged violation only.

[8] Slip op. at 12-13.

[9] Slip op. at 13. The Court cites, but does not apparently apply, two canons of construction.

[10] Slip op. at 14.

encroachment onto the fog line or beyond.[11]

How can a specific "interpretation" be declined, or a temporal or spatial limitation on the prohibited conduct drawn, without interpreting the statute? If there were something in the plain language of the statute that lent itself to the narrow disposition that there must be, at a minimum, more than a "touch," the Court's resolution would be the model of judicial restraint. But there is not. The Court necessarily construed the statute. And it did so without mentioning *Boykin v. State*—the style case for statutory construction—or even the Code Construction Act.[12] Instead, the Court says, "'Criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused[,]'" and that it has "a duty to narrowly construe statutes to avoid a constitutional violation."[13] But these canons of construction are only useful—only applicable—if one is construing a statute; they should not be used to circumvent the analysis by creating a "momentary touch" exception out of whole cloth.

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[11] Slip op. at 14 n.30.

[12] *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991); TEX. GOV'T CODE § 311.002(1) (claiming applicability to codes that, like the Transportation Code, were enacted by the 60th or a subsequent legislature). The absence of both is especially strange because the Court is currently considering whether the latter supplants the former. *Lang v. State*, PD-0563-17 (granted 10/4/17) (Issue 1a.: "Must *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) and its progeny be overruled to the extent they conflict with Texas Government Code Section 311.023, which Texas Penal Code Section 1.05(b) makes applicable to the Penal Code?").

[13] Slip op. at 13.

The Court's holding on this point is ultimately a statement of policy preference. And while underlying policy, or "the object sought to be obtained," is one of the extratextual factors this Court considers when plain language fails, it is properly considered in combination with many others that are absent from the analysis in this case.[14] Moreover, the driving policy—concern that even careful drivers may veer over the fog line without being aware of it[15]—is ill-advised. This Court explained over 100 years ago why the absence of intent with regard to traffic offenses—speeding, in that case—is not a problem: "Very few people in driving a car have an evil intent, but the Legislature, in protection of the public, has decreed it wise to limit the speed at which these cars may run, and each one is required to keep within that limit."[16] Unintentional acts or omissions on the road can have deadly consequences. Traffic regulations are designed to protect the public by encouraging better driving through the occasional issuance of a warning or Class C ticket.

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[14] *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014) ("Extratextual factors include but are not limited to: (1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision."). Nor is there consideration of the Texas Manual on Uniform Traffic Control Devices, which this Court has used on multiple occasions to help define Transportation Code offenses. *See Abney v. State*, 394 S.W.3d 542, 549 (Tex. Crim. App. 2013); *Rickels v. State*, 202 S.W.3d 759, 760 n.1 (Tex. Crim. App. 2006).

[15] Slip op. at 13.

[16] *Goodwin v. State*, 138 S.W. 399 (1911) (reh'g).

Exempting drivers from gentle correction so long as they do not notice the line dividing two lanes, or the sign stating the speed, or the officer directing traffic, is antithetical to the Code's purpose. If intoxication manslaughter can be a strict liability offense,[17] so can inadvertent driving on an improved shoulder.

Holding that a "momentary touch of the fog line, without any other indicator of criminal activity" is not an offense creates substantive problems, too. First, it suggests that, as a matter of law, reasonable suspicion cannot be based on a *de minimis* violation of a traffic regulation. Are speeding " a little over the limit" and signaling "a little less than 100 feet" before a turn also improper bases for a stop? Second, how are "constitutional violations" avoided by a construction that introduces vagueness and uncertainty into the plain language of the statute? Third, why is some "other indicator of criminal activity" required, and what could that indicator be? The "criminal activity" *is* the violation of the Transportation Code; no other conduct should be necessary.

This Court construed the statute to *some* degree using *some* of the requisite tools, at least as it pertains to painted markings. If the Court is compelled to provide additional bases for its holding beyond its factual conclusion, it should do a full

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[17] TEX. PENAL CODE § 49.11(a) (proof of a culpable mental state is not required for conviction of an offense under chapter 49).

analysis using the entire framework.

III. The "permissible purposes" analysis that shouldn't have been and wasn't.

Having found a legal basis to uphold the decision of the court of appeals, the Court should have (once again) stopped. But it also affirmed the court of appeals on a decision that court did not make, *i.e.*, appellee would have been justified in driving on the improved shoulder under two of the "permissible purposes" listed in section 545.058: (a)(3) ("necessary . . . to decelerate before making a right turn"), and (a)(5) ("necessary . . . to allow another vehicle traveling faster to pass"). The dissenting opinions explain why this overreach is extraordinary. The Court explains its departure from ordinary procedure by saying 1) "[i]t is time to dispose of the core issue," 2) the State had its chance to address it before this Court and, 3) the Court can look at the State's arguments from its brief to the court of appeals.[18] None of these explanations justify the Court's actions.

First, if the Court is correct that driving on the fog line a little bit is not "driving on an improved shoulder," the "core issue"—whether the trooper had reasonable suspicion to stop appellee—is settled. Additional exposition is just more *dicta*.

[18] Slip op. at 3-4, 17 n.32.

Second, the State chose not to pursue the matter out of respect for 1) the lower court, which adhered to TEX. R. APP. P. 47.1 by issuing an opinion that was as brief as practicable but that addressed the issues it deemed necessary to its disposition, and 2) this Court's cases, the vast majority of which refrain from reviewing "decisions" that have not been made. Had the State known that a "one remand" rule would be implemented such that it had one last "chance," it would have made the argument. And if the Court intended the opinion on this petition to be the last in this case, it should have granted the issue on its own motion when its absence was pointed out by the State at its inception.[19]

Third, the Court did not address any of the State's arguments that "are part of [its] record."[20] The State argued below that appellee's second movement onto the fog line would not have been excused under (a)(3) because he was not making a turn—he was exiting the highway.[21] This is supported by Findings 8 and 9, in which the trial court found appellee was stopped when the trooper believed he saw appellee's vehicle drive on the improved shoulder as it "exited the Interstate to the right at a marked exit ramp." The trial court calls this a "turn" in Conclusion 24, but that is a question of

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[19] PDR at 4 n.11 (summary of disposition below), 7 (conclusion to "Argument and Authorities"), 8 (prayer).

[20] Slip op. at 17 n.32.

[21] State's CoA Br. at 7.

law, not fact. The State also argued that there was no finding that it was "necessary" for appellee to drive on the shoulder either time.[22] None of these arguments are acknowledged. Instead, the Court again makes its own finding, concluding that appellee was going to turn right at the bottom of the ramp despite that "fact" being absent from, and perhaps contradicting, the trial court's findings.[23]

Proper presentation of the "permissible purposes" listed in section 545.058(a) requires more than the bare conclusion that appellee's conduct fit the exceptions. It requires *some* consideration of their meaning, which are at least subject to reasonable disagreement. Is the "pass" contemplated by (a)(5) any physical movement of one car traveling faster in the same direction, or is it intended only to accommodate other drivers who must cross into an oncoming lane to pass? It is presumably meant to do more than help avoid a collision, because that is its own exception.[24] Does the "right turn" mentioned in (a)(3) mean all rightward deviations from the original direction of travel, or only those movements right that require a signal?[25] It seems reasonable to confine its meaning to those situations in which crossing the shoulder is only

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[22] State's CoA Br. at 7-8.

[23] Slip op. at 17.

[24] TEX. TRANSP. CODE § 545.058(a)(7).

[25] *See Mahaffey v. State*, 316 S.W.3d 633, 638-41 (Tex. Crim. App. 2010) (discussing the failure to signal *vel non* when the driver's lane merges with another).

natural, as when making a right turn into a driveway or parking lot.

Proper presentation of this unbriefed issue also requires a finding that encroachment onto the shoulder was not necessary, or at least appeared unnecessary to the officer, as articulated by this Court in *Lothrop v. State*.[26] The Court does not address it. Why is it necessary to drive on the improved shoulder to allow a faster vehicle to pass when that vehicle has, and uses, its own lane to do so? And why is it necessary to drive on the improved shoulder to use an exit when the shoulder follows the off-ramp? It is not at all clear that *Lothrop*'s discussion of necessity settles these questions.

IV. Conclusion

The Court answers a question no one asked with analysis that addresses none of the arguments it claims to have before it. Appellee's "can" may no longer be kicked down the road,[27] but the result of this published opinion will be continued—if not increased—confusion for law enforcement, litigants, judges, and drivers. And while this is not the first case to decide an unpresented issue, it is the first to offer

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[26] 372 S.W.3d 187, 191 (Tex. Crim. App. 2012) ("Merely driving on an improved shoulder is not prima facie evidence of an offense. Thus if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and it is done safely, that officer does not have reasonable suspicion that an offense occurred.").

[27] Slip op. at 4.

such a broad rationale for doing so. It invites courts of appeals to spend their resources deciding each case on all the alternatives presented to it, lest they be deprived of the opportunity. It also encourages petitioners to cram every undecided issue that was before the court of appeals into each petition for discretionary review, lest they suffer the same fate as the State in this case. Neither practice contributes to orderly appellate review.

It is clear that six members of this Court agree with the trial court and the court of appeals that the stop in this case was unlawful. From a jurisprudential standpoint, however, its opinion does little more than settle a single appellee's case while adding two layers of undeveloped *dicta*.[28] It could have achieved the same outcome by dismissing the State's petition as improvidently granted. Even an opinion limited to questionable treatment of the trial court's findings would be preferable to legal holdings that may not bind this Court in the future but will hinder all of us below. If the Court refuses to grant rehearing on the briefed and unbriefed issues, it should consider both alternatives.

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[28] Worse, the question granted is currently pending before this Court in an other case. *State v. Hernandez*, PD-1380-16 (submitted 8/16/17).

PRAYER

WHEREFORE, the State prays that the Court grant this motion for rehearing, withdraw its opinion, and either permit briefing on the issue it raised *sua sponte*, narrow its opinion to its "factual" basis, or dismiss the State's petition as improvidently granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, this document contains 3,036 words according to WordPerfect X7's "word count" tool.

CERTIFICATE OF SERVICE

The State Prosecuting Attorney's Motion for Rehearing has been eFiled with the Court on the 30th day of January, 2018, and served on each of the following:

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